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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1146

SAUL STAMMAN and ROSE STAMMAN, individually, and SAUL STAMMAN on behalf of Prudential Operating Co., Inc., and Empire Park Inc., and ROSE STAMMAN on behalf of Empire Park Inc. (a defunct corporation),

Petitioners,

against

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AUSTERLIN, LEONARD WEISS, MARCY FINKS, GEORGE B. GORDON,

Respondents.

BRIEF OF RESPONDENT JOHN J. DILLON IN OPPOSITION TO WRIT OF CERTIORARI

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Statement

This is an application for a writ of certiorari by the plaintiffs Stambler. They desire to appeal from:

1. A judgment of Hon. William B. Herlands, United States District Judge entered June 23, 1969, dismissing plaintiffs' amended complaint for failure to state a cause of action against any of the defendants (B-5)*:

* Letters and numbers in parentheses are to pages of Petitioners' Appendix.

2. An order of Hon. Inzer B. Wyatt, United States District Judge dated October 24, 1989, denying plaintiffs' motion to amend Judge Herlands' judgment of June 23, 1989, to permit the service by plaintiffs of a second amended complaint (B-13);

3. An order of Hon. Inzer B. Wyatt, United States District Judge, dated December 1, 1989, denying plaintiffs' motion to re-argue the motion for leave to serve a second amended complaint; and,

4. An order and judgment of the United States Court of Appeals, Second Circuit, affirming the judgment of dismissal of Judge Herlands and post judgment orders (B-20).

Issues Presented Below

1. Does plaintiffs' amended complaint state a claim against defendant Dillon upon which relief can be granted?

2. On the record before the Court are plaintiffs entitled to leave to serve a second amended complaint herein?

History

In April 1980, respondent Wasylow contracted to sell a parcel of real property in the City of Yonkers to one Herbert Tannenbaum for $130,000. Respondent Finke, an attorney, representing Tannenbaum ordered a title policy from respondent Title Guarantee Company. A search disclosed a defect in title consisting of a gore or strip of land running through the property of Wasylow and the adjoining property owned by respondent County Dollar Corporation.

The defects apparently occurred in descriptions in prior conveyances drawn after both properties had been acquired by the City of Yonkers through in rem tax foreclosure, sale and judgment.

When Finke advised Wasylee of the problem, Wasylee proceeded to obtain a quit claim deed from the survivors of the deceased owner of all but the organizational stock of appellant Empire Park, Inc., the former owner. Title Guarantee Company considered this deed insufficient to overcome its objection to the title.

In November 1960, Finke spoke to one Jack Jacobs, who was president and sole stockholder of Prudential Abstract Co., Inc., which had made a prior search which had failed to uncover the gore. Jacobs recommended petitioner Saul Stambler to Finke as an experienced man in this field.

Prior thereto, on September 8, 1960, by letter, Title Guarantee had advised Finke that title to the gore was vested in Empire Park, Inc. under a deed from one, Ann N. Sawyer dated November 14, 1924; and that Empire Park, Inc. had been dissolved in 1938. Stambler was furnished with this information including the fact that the former president of the corporation had died survived by a spouse and a son, the appellee George B. Gordon.

Stambler communicated with Gordon, representing himself to be an officer of a title company which had been hired by Wasylee to clear title to Wasylee's property. On November 30, 1960, he wrote to Gordon on the stationery of Jacobs' firm, the Prudential Abstract Co., Inc., enclosing an affidavit for Gordon and an assignment of stock of Empire Park, Inc. to be executed by Gordon's mother to appellant Rose Stambler who is Stambler's wife. When Gordon asked why the assignment was made out to his wife, Stambler said it was a matter of convenience.

Stambler was neither an officer nor an employee of Prudential Abstract Co., Inc. Gordon stated that he would not have executed the affidavit nor would he have advised his mother to execute the assignment of stock except for Stambler's misrepresentation which he believed to be true.

Stambler also obtained an affidavit and assignment of stock from one Sadie Schachner. That affidavit as well as the Gordon affidavit states that the stock assignment was

made in order "to aid *interested parties* to cure defects in title to lands formerly owned by Empire Park, Inc."

On December 31, 1960, Rose Stambler, as "sole surviving director" of Empire Park, Inc. executed a quit claim deed which purported to convey the gore to Prudential Operating Co., Inc.

Wasylec, at this stage, was unable to convey title to the property in accordance with the contract of sale which provided for a title "such as any approved title company will approve and insure". Wasylec was also being sued by the real estate broker who had negotiated the sale for $6,500 in commissions.

Under these circumstances Wasylec agreed with Stambler to pay $15,000 for a conveyance of the gore which ran through his property. A title closing was held on June 26, 1961, at which Prudential Operating Co., Inc. conveyed the necessary portion of the gore to Wasylec for $15,000 and Wasylec simultaneously conveyed his property to Tannenbaum in accordance with the contract of sale.

As Stambler was leaving the closing he was served with process in which Wasylec asked for the return of the $15,000 from Stambler and his wife, Jacobs, Prudential Operating Co., Inc. and Empire Park, Inc. He also named Finke, Tannenbaum and others interested in the purchase of his property as party defendants. In addition, Wasylec asked that the Court impress an equitable or constructive trust in his favor on the remainder of the gore—the portion running through the property owned by respondent County Dollar Corporation.

Subsequently, two other actions were commenced one by County Dollar Corporation pursuant to Article 15 of the New York Real Property Actions and Proceedings Law against Empire Park, Inc. and Wasylec barring them from all claims to the County Dollar property and clearing its title, and another by Prudential Operating Co., Inc.,

against Wasylee and others to set aside the conveyance of the gore on the theory of fraud and for $1,000,000 in damages.

These three actions were consolidated and tried before Justice Dillon.

Upon the above facts, as well as others, Justice Dillon decided that Stambler had no right to act for himself and to acquire title to the gore. He went on to say, "It is well established that when a person acquires title to property through a scheme of deceit and fraud, as in the instant case, the court will not permit him to retain the fruits of the wrong but will impress a constructive trust upon the property in favor of those who in good conscience are entitled to the property" (citing cases).

Justice Dillon, in his decision, noted that Mrs. Gordon and Mrs. Schachner were not parties in the actions before him but nevertheless he was of the opinion that the doctrine enunciated in the cases he cited "should be utilized to protect the interests of those persons who actually sustained damages because of Stambler's wrongful acts. In support of his conclusion he cited *Bron* v. *Weintrab*, 42 N. J. 87, which relied on *Latham* v. *Father Divine*, 299 N. Y. 22, where the New York Court of Appeals held that the concept of a constructive trust "is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them."

Justice Dillon determined that "it would be grossly unfair and contrary to public policy to permit Stambler and his associates to retain the unconscionable consideration exacted from Wasylee." He granted judgment to County Dollar Corporation clearing its title and dismissed the action by Prudential Operating Co., Inc.*

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* The entire recitation of events summarized above is contained in the decision rendered by Justice Dillon after trial (C15-C24).

Judgments were entered in each case. On appeal to the Appellate Division, Second Department, all judgments were affirmed 28 A. D. 2d 825; 28 A. D. 2d 822; 28 A. D. 2d 824 (1967). Appeals were taken to the New York Court of Appeals, which, on November 2, 1967, granted motions to dismiss the appeals. 20 N. Y. 2d 803.

Proceedings Below

An action was commenced on February 8, 1968, against the respondents by the following plaintiffs: Saul Stambler, Rose Stambler, Empire Park, Inc. (a defunct corporation), Empire Park, Inc. and Prudential Operating Co., Inc. The plaintiffs were all represented by Rene Harry Karsten, Esq., 5 Beekman Street, New York, New York. On July 5, 1968 plaintiff Saul Stambler filed a notice that Mr. Karsten was relieved and that the plaintiffs were proceeding pro se.

The complaint founded on 28 U.S.C. 1331, 1332 and 1333, 42 U.S.C. 1981, 82, 83, 85 and 86; and 2201 and 2202, alleged:

That pursuant to a conspiracy to deny plaintiffs their constitutionally guaranteed rights, the defendants conspired to perform certain acts leading to and including lawsuits against the plaintiffs (pars. 9, 10 and 11, pp. 9 and 10); that Justice Dillon consolidated the matters for trial and forced plaintiffs to trial (pars. 13-15, p. 10); that the trial was unfair (par. 16, p. 10); that Justice Dillon found plaintiff Stambler guilty of "fraud and deceit" (par. 17, p. 11) allegedly a crime under Article 86 of the New York Penal Law (See decision, Exhibit "B", pp. 7, 9) and that Justice Dillon had no jurisdiction to try plaintiff Stambler on the crime charged (pars. 18-22, pp. 11-12). These latter allegations respecting a so-called criminal charge, represented, it seems, the pleaders' literary license. There were no criminal charges pending against Stambler. The only

trial before Mr. Justice Dillon was the consolidated trial described above and the only decision was the one rendered in that trial in the course of which, as the decision noted, the Court found that Stambler had practiced fraud and deceit.

Petitioners concluded that this alleged conspiracy deprived them of their right to be indicted by a Grand Jury (par. 24, p. 12).

Justice Dillon moved to dismiss the complaint pursuant to Rule 12(a) (1, 2 and 6) and for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. The motion came on before Judge McGohey who treated the motion as one for summary judgment and dismissed the complaint saying that the complaint "does no more than charge Justice Dillon in the most general terms with participation in the alleged conspiracy. This is not enough . . . the complaint shows only that the Judge performed the normal duties of his office . . . ." (31-4).

In the course of his opinion Judge McGohey expressed the opinion that since no damages were sought against Justice Dillon, the doctrine of judicial immunity does not apply, relying on *United States* v. *Clark*, 249 F. Supp. 720, 727 (S. D. Ala. 1965).

Petitioners then moved for leave to amend the judgment of dismissal for leave to serve an amended complaint upon all parties and for permission to take testimony of the defendants pursuant to Rule 26. The remaining defendants (other than Judge Dillon) moved to dismiss the original complaint as to them.

Judge Tenney, in a memorandum order dated October 7, 1968, granted the motion to amend as to the individual plaintiffs but dismissed the complaint as to the corporate plaintiffs under the "well established" rule that a corporation cannot appear other than by an attorney.

Judge Tenney, after observing that Judge McGohey had stated that "the court clearly has jurisdiction of the ac-

tion as against Justice Dillon under Section 1343 of Title 28 U.S.C." before he dismissed the complaint for failure to allege a cause of action, granted leave to serve an amended complaint and pertinently stated that he "expressed no opinion as to whether plaintiffs can eventually state a cause of action". Leave to take the deposition was denied as premature (78).

Then the individual plaintiffs, Saul and Rose Stambler, on behalf of themselves and the corporate plaintiffs, moved to take the oral testimony of Justice Dillon pursuant to Rule 26(a) of the Federal Rules to enable them to "properly frame the amended complaint". This motion came on before Judge Wyatt. He denied the application in a memorandum order dated November 9, 1968 (87-89) saying:

> "There is no authority . . . for any such deposition. Even if such a deposition were authorized, it is clear that it ought not to be permitted here. There can be no possible claim against Mr. Justice Dillon. As the complaint properly recognized, he is absolutely immune. *Bradley* v. *Fisher*, 80 U. S. 335 (1871).)
>
> The explanation made above establishes that such motions as the present are harassment to all those concerned. The plaintiffs are taking the time of judges of this Court to deal with essentially frivolous matters to the prejudice of other litigants in this Court. Plaintiffs are strongly advised to desist in such conduct. Continuance can only lead to the imposition of sanctions or the entry of an injunction against plaintiffs or both."

On December 5, 1968, the individual plaintiffs served a notice of appeal from Judge Wyatt's decision and order. No appeal was taken.

The individual plaintiffs then served an amended complaint on or about November 27, 1968 in which they pur-

ported to sue on behalf of the three named corporations as well as for themselves (C1).

Justice Dillon, as well as the other named defendants, moved to dismiss the amended complaint. This motion came on before Judge Herlands. Justice Dillon contended that petitioners had again failed to set forth any facts which would constitute a cause of action. The complaint simply attempted to analyze Justice Dillon's decision; argue that he was wrong and that he reached the wrong conclusion as a result of a conspiracy with all the other persons involved in the litigation. It was pointed out that this was exactly the kind of complaint rejected in *Powell v. Workmen's Compensation Board of the State of New York*, 327 F. 2d 131, 137-138 (1964). It was also again submitted that Justice Dillon had absolute immunity under the authority of *Pierson v. Ray*, 386 U. S. 547 and *Morgan v. Sylvester*, 125 F. Supp. 380 (S.D.N.Y. 1964), aff'd 220 F. 2d 758 (2d Cir. 1958), cert. den. 350 U. S. 867.

The amended complaint alleged that jurisdiction over Justice Dillon was based on the exception to the doctrine of judicial immunity recognized in *Bradley v. Fisher*, 80 U. S. 335, 351 (1871-2).

In that case this Court said:

> "... judges of courts of superior or general jurisdiction are not liable to civil action for their judicial acts, even when such acts are in excess of jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between exercise of jurisdiction and the clear absence of all jurisdiction over the subject matter."

Petitioners, in this contention, totally ignored Judge Wyatt's holding of November 8, 1968 that Justice Dillon had jurisdiction of the subject matter.

Judge Herlands dismissed the amended complaint on June 23, 1969 (29-43) holding that Justice Dillon is im-

mune from any liability under the Civil Rights Act and that no cause of action is asserted under *United States* v. *Clark*, 249 F. Supp. 720 (S. D. Ala. 1965), where he acts within the scope of his judicial duties as he did in this case and was not, in so doing, violating any federally protected right (B9).

Petitioners then moved for an order to amend Judge Herlands' judgment of dismissal entered June 23, 1969 to permit the service of a further amended complaint and to permit the taking of a deposition of Mr. Justice Dillon. The motion was referred to Judge Herlands. After his passing the motion was transferred to Judge Wyatt by order of the Chief Judge on October 9, 1969.

Judge Wyatt denied the motion on the law and in the exercise of discretion (B18) saying among other things:

> "This motion and the action itself are notably lacking in merit but the frivolous and harassing character of the litigation furnishes a depressing example of the waste of the time of many judges (and their supporting staffs) to the prejudice of other litigants with serious questions to be resolved (B14). . . . Judge Herlands stated that the action was 'unfounded and has probably been maintained in bad faith', that plaintiffs made 'reckless accusations' and that the action was 'indeed baseless'." (B18)

Undaunted, petitioners moved to reargue that motion. Judge Wyatt, of course, on December 1, 1969 denied the application "as frivolous and without merit and in violation of the order that plaintiffs made no further motion or applications to this court except in connection with any appeal to the Court of Appeals".

On September 23, 1970, the Court of Appeals for the Second Circuit (Waterman, Moore, Kaufman, C.J.J.) unanimously affirmed the judgment dismissing petitioners' amended complaint and the post judgment orders denying petitioners' post judgment motions (B20-22).

POINT I

Respondent Dillon, as a Justice of the Supreme Court of the State of New York, is entitled to absolute immunity from all civil suits, including civil rights actions, in the exercise of his vested judicial authority.

A Justice of the Supreme Court of the State of New York has general jurisdiction in law and equity. New York State Constitution Art. 6, Sec. 1. The actions which were tried and decided by Justice Dillon about which appellants complain were undoubtedly within the jurisdiction of the State Supreme Court. It was recognized in *Bradley* v. *Fisher*, 80 U. S. 335, 347 (1872), that:

> "• • • [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and *would destroy that independence without which no judiciary can be either respectable or useful.*" (Emphasis added.)

That principle has received general acceptance. *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Fasale* v. *Sheehy*, 385 F. 2d 866 (2d Cir. 1967); *Morgan* v. *Sylvester*, 125 F. Supp. 380 (S.D.N.Y. 1964), aff'd 220 F. 2d 758 (2d Cir. 1955), cert. den. 350 U. S. 867 (1960).

In *Pierson* v. *Ray*, *supra*, this Court said (p. 554):

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on

> appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."

Petitioners sought to avoid the impact of this fundamental principle by joining Justice Dillon as a defendant in this tort action for damages without seeking damages from him (52). This was nothing but a clever ploy that cannot be sanctioned as a permissible avoidance of the clear expression of judicial immunity from civil suits. The essence of the principle is founded upon the proposition that a judge should not be required to engage in litigation with "unsatisfied litigants". *Pierson v. Ray, supra.* That immunity cannot be circumvented by simply failing to ask for damages, but nevertheless, compelling a judge to enter into a contest to justify his determination.

Petitioners might argue that in addition to their claim for damages, they are seeking a judgment from the federal court declaring the judgment rendered by Justice Dillon on April 22, 1965 to be null and void by reason of a lack of jurisdiction (59). However, this request for relief cannot support a suit against Justice Dillon. An attack against the judgment of the court for lack of jurisdiction is not one which requires personal defense by the judge rendering the judgment.

Moreover, jurisdiction is primarily determined by the court itself subject to review by appellate courts. Certainly the federal court should not be asked to decide by way of a declaratory judgment whether the state court had jurisdiction over the subject matter in litigation in that court. In fact, that the Supreme Court of the State of New York had jurisdiction over the litigation which resulted in Justice Dillon's decision is so evident that discussion is pointless.

In the amended complaint appellants alleged that Mrs. Gordon and Mrs. Schachner were not parties to the litigation and, since Justice Dillon acknowledged that fact, he had no jurisdiction over the subject matter of the action, and, therefore, knowingly exceeded his jurisdiction in ruling that the title to the property was in Wasylee and County Dollar Corporation (C9-10). Such a claim is simply without any merit. Even if there were a question whether the property rights of Mrs. Gordon and Mrs. Schachner were affected by Justice Dillon's decision, it is perfectly clear that the court was not precluded from deciding the rights and interests of the appellants who were before the court. Only Mrs. Gordon and Mrs. Schachner could possibly claim that they were not bound by the judgment.

The "subject matter" argument was contrived out of appellants' attempt to come within the exception to immunity noted in *Bradley v. Fisher, supra*, 80 U. S. 335 where this Court noted: "A distinction must be here observed between excess of jurisdiction and clear absence of all jurisdiction over the *subject matter*" (pp. 351-352). This Court said that where there was clearly no jurisdiction over the *subject matter*, immunity would not enure. As an example, the Court posed a situation where a probate court with authority only over wills and settlements of estates of deceased persons should proceed to try parties and public offenses when there was no such jurisdiction in the court. This analogy bears no relation to the lawsuits decided by Justice Dillon.

Petitioners contend that since Judge McGohey had taken the position that the federal court has jurisdiction of the action as against Justice Dillon under Section 1343 of Title 28 U. S. C., that this became the law of the case and other judges of the district court should be bound thereby. Again appellants are mistaken and are attempting to employ artful confusion. Judge McGohey treated the motion to dismiss the complaint as a motion for summary judg-

ment and dismissed the complaint holding that "the complaint fails to allege sufficient facts to show that Justice Dillon was part of any such conspiracy if one existed. The complaint does no more than charge Justice Dillon in the most general terms with participation in the alleged conspiracy. This is not enough . . . the complaint shows only that the judge performed the normal duties of his office in the trial and decision of the issues in a strongly contested litigation" (134).

Having dismissed the complaint there was no action pending against Justice Dillon and there was no way to review Judge Metzbaw's opinion that Justice Dillon could be sued.

When Judge Timmy permitted appellants to serve an amended complaint, no one could know what a new complaint would allege or whom the appellants would include as plaintiffs or defendants.

The motion to dismiss the amended complaint decided by Judge Herlands dealt with an entirely new complaint. Under these circumstances Judge Herlands was not bound by Judge Metzbaw's dictum. Moreover, Judge Herlands assumed jurisdiction under Section 1343 "to determine whether plaintiffs have stated a claim for relief" (139). He concluded that Justice Dillon is immune from liability under the Civil Rights Act (1510) noting *United States v. Clark*, 240 F. Supp. 721 (S. D. Ala. 1965), upon which Judge Metzbaw relied. He concluded that "it appears beyond doubt that plaintiffs can prove no set of facts to support their allegations of state action" (1510). Judge Herlands further observed that the characterizations of the defendants as "conspiratorial" and "malicious" is "not supported by any facts, and none of the overt acts which the amended complaint sets forth warrants an inference that a conspiracy existed whose purpose was to obstruct justice or to deny plaintiffs the equal protection of the laws" (1511).

Judge Wyatt was equally convinced that appellant had no cause of action (1318) as was a unanimous Court of Appeals.

It is submitted that any reliance on *United States* v. *Clark, supra*, was misplaced. That case is readily distinguishable. In *Clark*, the court said that the federal court had the power to enjoin state officials, including judges, from interfering with the federally guaranteed voting rights of Alabama citizens under color of state law. The action before Justice Dillon did not involve the deprivation of a federally protected right and equally important, he had long since ended his judicial function when this action was begun. Judgment was entered in the state courts on April 22, 1965 (59). The original action herein was commenced on February 8, 1968. He was *functis officio*. *Vogel* v. *Edwards*, 283 N. Y. 118, 121 (1940). There was nothing for the federal court to enjoin Justice Dillon from doing.

POINT II

An action under the Civil Rights Act may not be used as a subterfuge for obtaining a review and retrial of state court proceedings.

These petitioners have availed themselves of their appellate rights in the New York State courts and have been unsuccessful. If Justice Dillon lacked jurisdiction to render a judgment, that could have been urged in the New York Appellate Courts.

This gambit is not new. In rejecting a claim of conspiracy, the Court, in *Powell* v. *Workmen's Compensation Board of the State of New York*, 327 F. 2d 131 (1964), said (p. 127): "The allegations contained in the complaint indicate no more than the action of several interested parties . . . who sought vigorously to protect their own interests, coupled with the normal [legal] processes of adjudication and appeal. Indeed, were we to hold this com-

plaint sufficient, we would be inviting every party to a state proceeding . . . to file a complaint in this Court reciting the history of his state case and concluding with a general allegation of conspiracy."

Similarly, in *Morgan v. Sylvester*, 125 F. Supp. 380, 387 aff'd 220 F. 2d 758 (2d Cir. 1955), cert. den. 350 U. S. 867, it was said this way:

> "This action is a clear attempt, despite plaintiff's assertion to the contrary, to obtain a review and a retrial of the State Court proceedings. The fact that a defeated litigant is prepared to charge a 'conspiracy' recklessly or otherwise and recite in haec verba the language of the Civil Rights Act does not give a right of review in the Federal Courts. To uphold the claim here advanced upon such conclusory allegations 'would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision.'
>
> This case demonstrates forcibly the wisdom of the public policy which grants immunity to judicial and other officials for acts performed in the discharge of their duties. If in circumstances such as this defendants may be made to answer for their determinations, not only would the independence of the judiciary be undermined, but a ready means would be at hand to paralyze the entire judicial system."

POINT III

Assuming that Justice Dillon is subject to suit, the record facts fully justified the dismissal of the original complaint by Judge McGohey, the dismissal of the amended complaint by Judge Herlands and the denial by Judge Wyatt, as a matter of law and in the exercise of discretion, of any further attempts to serve another complaint.

It is unnecessary to burden this Court further with repetitive argument. Every judge who has had this matter before him has indicated that the circumstances of the action and the decision rendered by Justice Dillon after trial do not and cannot form the basis of a conspiracy.

A reading of the amended complaint illustrates that this is exactly what these petitioners have been attempting to do. There is no reason to prolong this interminable litigation. It is strongly, but respectfully, suggested that this Court put a note of finality to this vexation and harassment of Mr. Justice Dillon by these petitioners.

CONCLUSION

Certiorari should be denied.

Dated: New York, New York,

Respectfully submitted,

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